IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 251 of 2003
WITH
CIVIL APPLICATION NOS.5388 OF 2003 & 6191 OF 2003

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SUVIDHA BUILDERS - THRO' VAHIVATKARTA

Versus

DILIPSINH PRAVINSINH

Appearance:
1. Appeal from Order No. 251 of 2003
MR MC BHATT for Petitioner No. 1-7
MR JC VYAS for Respondent No. 1-2
..... for Respondent No. 3-9
MR YN RAVANI for Respondent No. 10

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 10/02/2004

CAV COMMON JUDGEMENT

1. This appeal under O.43 R.1 Civil Procedure Code (CPC for short) is preferred by the appellants challenging the part of the order having adverse effect passed by the ld. Civil Judge (S.D.), Ahmedabad (Rural) while dealing with application exh.30 in Spl.Civil Suit No. 81/2001. The application exh.30 was preferred on 4.7.2003. Prior to this application Exh.30, injunction application preferred by opponent nos. 1 & 2 in another litigation namely Reg. Civil Suit No. 165/2000 in reference to the same land, was dismissed on merits on 29.6.2002, and an order passed in favour of the present appellant below exh.5, the very suit No.81/2001 was operative.

2. The dispute between the parties centres around the land bearing Survey No.276 of village Bodakdev, Ta: Dascroi, District:Ahmedabad (Final Plot No.22 & 23 paiki) admeasuring about 2700 sq.mts. It is averred in the application exh.30 that original owner of the very piece of land has executed a registered sale-deed on 28.2.2000. The allegation in the application is that after ex-parte order passed by ld. Civil Judge (S.D.), Ahmedabad (Rural) in Reg. Civil Suit No.165/2000 and before the Court Commissioner could draw panchanama as to the possession of the applicants, the original plaintiff of Spl.C.A No.81/2001 by high-handed action, removed the signboard and obstructed the proceedings of the Court Commissioner. The case in the application exh.30 is that with the help of police protection, they had acquired possession of the suit land and, therefore, at least till the disposal of the suit, original plaintiff in whose favour the Court has passed the favourable interim order below exh.5 in Suit No.81 of 2001, should not be permitted to carry out any type of construction work and they also should be prevented from alienating or transferring any part of the land or the property constructed to third party.

3. The arguments advanced by ld. counsel appearing for the respondents (applicants of application exh.30 and defendant nos. 1 & 2 of the suitNo.81/2001) is that if the parties are not asked to maintain status quo qua possession and title of the suit property, then the applicants of above-said application exh.30 would suffer irreparable loss and remedy would be frustrated. At one point of time, it is argued by ld. Sr.Counsel Mr. Y.N.Oza that the order under challenge passed by ld. Civil Judge is a prudent order and parties should be relegated to the trial court for appropriate directions to try and decide both the suits i.e. Reg.Civil Suit No.165/2000 and Spl.Civil Suit No.81/2001 simultaneously.

4. Ld. Sr.Counsel Mr. Bhatt appearing for the appellants has canvassed the following main grounds:-

(i) That the main relief prayed in Spl.Civil Suit No.81/2001 is to declare the sale-deed dated 28.2.2000 as invalid, unathorised and otherwise illegal. It is inter alia prayed that the defendants of the suit may be restrained by permanent injunction from disturbing the plaintiff's peaceful possession and enjoyment of the suit property and the order under challenge passed below application exh.30 goes to the root of the right to occupy and enjoy the property of the appellants plaintiffs. The order under challenge does not tilt the balance, but impliedly affects adversely to the order passed below exh.5. Undisputedly, the application exh.5 of the very suit was heard on merits and the ld. Civil Judge has allowed the application vide order dated 17.10.2001. The interim relief granted in favour of the appellants plaintiffs was operative till the day on which application exh.30 was preferred and the same is still operative. There was no need to entertain the application exh.30 in the very suit at the interim stage when it has been held prima facie that the defendant nos. 1 & 2 have prepared the document dated 28.2.2000 in respect of the suit land, and there was no scope to interpret otherwise the interim relief granted in favour of the plaintiffs as well as in Reg.Civil Suit No.165/2000. In the suit filed by the present appellants and respondent no.10 against respondent nos. 1 to 9, respondent nos. 1 & 2 could not have made any motion for obtaining interim relief because the prayer made in the application exh.30 amounts to modification of the order passed below exh.5 on merits. In absence of any change in circumstances or the facts under which the Court can exercise powers under Sec.151 of Code of Civil Procedure (CPC for short), the application exh.30 ought to have been rejected being not maintainable. Relief prayed in Suit No.165/2000 in reference to the conduct of respondents needs serious consideration.

(ii) Ld. Sr. Counsel Mr. Bhatt has taken me through the contentions raised by the appellants in ground (m) of the memo of the appeal and has stated that the ld. counsel appearing for the other side has not challenged the genuineness of 13 different documents executed between 1992 & 1997.The name of the purchaser and seller contained in all the 13 documents were brought to the notice of ld. Civil Judge and for the sake of convenience, this list is also produced as Annex.A with the memo of appeal.

(iii) The land in dispute originally was an agricultural land bearing Sr. No.276 of village Bodakdev, but on application of TP Scheme No. I-B, it was identified as original plot No.78/1 and 78/2 and both the plots and ultimately shown in the maps produced by both the parties as Final Plot Nos. 22 & 23. It is not a matter of dispute that Sr. No.276 was admeasuring about 19920 sq.mts. and in lieu of this survey No.276, Ahmedabad Urban Development Authority (AUDA for short) has allotted Final Plot No.22 admeasuring about 11309 sq.mts. and Final Plot No.23 admeasuring about 2324 sq.mts. to the original owners. Out of Sr.No.276, 6287 sq.mts. of land is identified for various public purposes. The total area of F.P. Nos. 22 & 23 comes to 13633 sq.mts. The land allegedly transferred by the original owners to respondent nos. 1 & 2 admeasuring 2700 sq.mts. is neither identified area nor demarcated in the map as a parcel of land. Merely because respondents nos. 1 & 2 are not able to indicate or identify the land alleged to have been purchased by them under the doubtful deed i.e. exh.32/6, ld. Civil Judge ought not to have granted reliefs as prayed for in the application exh.30 when a legal and valid order passed by the Court below exh.5 was operating against all the defendants including present respondent nos. 1 & 2. It seems that the original owners had sub-divided F.P.No.22 in three different portions and aforesaid sub-divisions were sanctioned by the revenue authorities as well as by AUDA. So, it was possible to identify and/or demarcate the land allegedly sold to respondent nos. 1 & 2. Failure in doing so adversely affects the merit of application Exh.30.

5. The arguments of ld. Sr. Counsel Mr. Y.N.Oza is that respondent nos. 1 & 2 are relying upon the registered sale-deed which is under legal scrutiny in the very suit filed by the present appellants. Huge amount of consideration has been paid and the stamp deputy is also spent. The appellants are violators of revenue laws and they have played with the scheme floated for the weaker section of the society under Sec.21 of the ULC Act. So, the ld. Judge has rightly held that there should not be any further alienation or transfer of the property. When the basic document is under scrutiny, then the parties should be left to a regular trial and the contents of the written statement should not be ignored merely because no formal permission to file written statement on the relevant date was granted.

6. Even during the course of oral submissions, ld.

Sr. Counsel Mr. Y.N.Oza was asked to point out the area sold to respondent nos. 1 & 2 by ld. Sr.Counsel Mr.Bhatt for the appellants, but the backbone of the arguments of ld. Sr.Counsel Mr. Oza is that the present appellants have entered into an illegal transaction qua the parcel of land for which the original owners had obtained permission under Sec.21 of the Urban Land Ceiling Act (ULC Act for short) for providing houses to the weaker section of the society. However, according to ld. Sr.Counsel Mr. Bhatt, the original owners did obtain permission under Sec.21 of ULC Act for implementing the scheme for the weaker section of the society for FP No.23 admeasuring about 2324 sq.mts. and the buildings are constructed viz. Raw houses and respective Raw houses have been allotted to the members and at present, they are residing in Raw houses since last about 10 years. So far as F.P.No.22/2 (one of the sub-division made) admeasuring about 5151.73 sq.mts. is concerned, the original owners have obtained permission under Sec.21 of the ULC Act and allottees- members of the Scheme are at present occupying that parcel of land and constructed houses. Deduction of the land admeasuring about 6287 sq.mts. from the total area as TP Deduction, the question of transferring that land or part thereof does not arise and even if that is transferred, the appellants or respondent no.10 are not concerned and that parcel of land or part thereof can not be said to be the suit property.

7. During the course of oral submissions, ld. Sr.Counsel Mr. Bhatt is able to point out prima facie that the appellants have purchased only retainable land of original owners admeasuring about 6157.27 sq.mts. under 13 different sale-deeds. These sale-deeds include the entire F.P. No.22/1 and F.P. No.22(3). (other two sub-divisions). Pedigree of original owners produced by the appellants also is a circumstance which shall have to be appreciated by the trial Court. It is ignored while dealing with Exh.30. This pedigree is prepared on the basis of various documents. The sale-deed under question exh.32/6 is executed by respondent nos. 2 to 9 who belong to the branch of Shivaji. In the proceedings under the ULC Act, the competent authority has held that the branch of Shivaji was entitled to hold "freehold retainable land" to the extent of 1000 sq.mts. only forming the part of F.P.No.22. So, the branch of Shivaji was not holding any parcel of land as available with the Branch from F.P.No.23. Therefore, there was no reason for this Branch to execute sale-deed exh.32/6 for the land admeasuring about 2700 sq.mts.

8. To understand the say of the respective parties

and the submissions advanced during the course of arguments, both the Sr. Counsel on request have produced true copy of the maps of the land of original Sr.No.276 and F.P. Nos. 22 and 23. I have carefully gone through the maps produced by the parties and it would not be possible to say at this stage that respondent nos. 2 to 9 are bonafide purchasers of the land described in the sale-deed mark 32/6. The conduct of the parties reflected in the proceedings of both the suits and especially in Spl.Civil Suit. No. 81/2001, also shall have some impact on the decision in the suits when they are tried on merits. The substantial difference in the amount of consideration reflected in the sale deeds executed between 1992 & 1997 and the sale-deed executed in favour of respondent nos. 2 to 9 needs appreciation and there is a scope to explain the contingency by the appellants plaintiffs in the suit proceedings.So, this can not be considered as a circumstance against the plaintiffs. Respondent nos. 2 to 9 had not even cared to file written statement and no counter-claim was raised. When a party was not permitted to file a written statement, whether he can enjoy any interim relief in his favour ? is also a question which has not been properly replied by the ld. Judge while dealing with application exh.30.

9. Ld. Sr.Counsel Mr. Bhatt has placed reliance on one decision reported in the case of Ramesh Chand Ardawatiya v/s Anil Panjwani, reported in 2003 AIR SCW 2590 in support of his submissions. After referring four different decisions, the Apex Court has held:-

" ...that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under R.1 may itself contain a counter-claim which in the light of R.1 read with R.6-A would be a counter claim against the claim of the plaintiff preferred in exercise of legal right conferred by R.6-A. Secondly, a counter claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter claim may be filed by way of a subsequent pleading under R.9. In the latter two cases the counter-claim though referable to R.6-A can not be brought on record as of right but shall be governed by the discretion vesting in the Court, either under O. VI R.17 of C.P.C. if sought to be introduced by way of amendment, or subject to exercise of discretion conferred on the Court

> under O.VIII,R.9 of the C.P.C. if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading could be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up on the written statement within the meaning of R.6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter-claim being raised by way of "subsequent pleading" as there is no "previous pleading" on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant- appellant. ....."

10. Mr. Y.N.Oza, ld. Sr.Counsel appearing for ld. Counsel Mr. J.C.Vyas for respondent no.1 & 2 has submitted that the contesting defendants have already tendered their written statement with an application to grant permission to file written statement, but while

dealing with application exh.30, the ld. lower Court ought to have considered the scope of success of the defendants. Considering the scheme of CPC, it is difficult to concede that the defendant has been conferred with a right to attack the plaintiffs by way of counter-claim in that very suit in which he has not been held entitled to defend himself by filing written statement. The day on which application exh.30 was decided, the right to file written statement of the defendant was hanging and even on the date of hearing of the present appeal, it was still hanging.

11. The material averments in application exh.30 are vague and vagueness is found relevant when the property admeasuring about 2700 sq.mts. described in the sale-deed has not been identified. Some mistake in maintaining Revenue Record may have tempted the parties of document mark 32/6 to enter into exercise. The date of sale-deed executed in favour of the plaintiffs and respondent no.10 and the document exh.32/6 are relevant. Even subsequent deeds executed in favour of the plaintiffs do not affect the validity and legality of the documents earlier executed and there is a scope of explanation. Therefore only, pending the hearing and disposal of the present appeal, the appellants were permitted to go on with their construction work and alienation of title or allotment of constructed area which was yet to be allotted to the respective allottees or potential purchasers is kept under cloud. On the strength of the statement made by ld. Sr.Counsel Mr. M.C.Bhatt, this situation is worked out. So, it is rightly submitted that there is ample scope for the plaintiffs to succeed in the suit and if they are prevented by any type of prohibitory order of the nature passed below exh.30, that would create great hardship not only to the owners, developers, but also to the potential purchasers and allottees who have invested their valuable savings in the scheme floated on the land. The arguments developed by ld. Sr.Counsel Mr. Oza in reference to certain provisions of ULC Act are not found convincing. It is on record that the parcels of land demarcated to put up the scheme under Sec.21 of ULC Act for weaker section of the society, are utilised. So, for the sake of arguments it is accepted that while floating the scheme, builders or developers may have allotted the constructed houses not to the members belonging to weaker section of society, even than it would not go to the root of the merits of the present appeal and the alleged violation obviously could be subject to other proceedings and before other appropriate forum. The decision of rejecting Civil Application No.4325/2003 in A.O. St.

No.246/2003 is also relevant. Said Civil Application for condonation of delay in filing A.O. St.No.246/2003 was heard and could have been decided on the day on which it was heard, but at the request of ld. counsel appearing for the parties and especially by ld. Sr.Counsel Mr.Oza appearing for the applicants of aforesaid civil application, the Court accepted to pronounce decision in Civil Application as well as in present Appeal from Order simultaneously, on the same day.

12. Plain reading of the order under challenge creates an impression that the ld. Judge has decided the point of prima facie case and balance of convenience without assigning legal and convincing reasons. The list of documents produced by the original plaintiffs including permission granted by the local authority to construct along with other sanctions or permissions, have not been appreciated. The day on which the application exh.30 was preferred, there was no effective appeal pending before the appellate forum against the decision below application exh.5 delivered much earlier i.e. on 17.10.2001. The positive arguments advanced before the ld. Judge in reference to the earlier decision dated 17.10.2001 have not been appreciated in light of the principles of "constructive res-judicata" that too in absence of effective appeal or specific written statement.

13. It is true that while dealing with the appeal under O.43 R.1, the appellate Court has a limited role to play and jurisdiction is comparatively very narrow. But when it is found that the order under challenge is based on an erroneous consideration of all relevant documents and certain documents have been ignored, then the effect of such error on the ultimate finding should be considered. In the present case, the ld. Judge while dealing with application Exh.30, has committed more than one errors which go to the root of the legality and propriety of the order. There is an element of non-application of mind also. Merely because in some cases, the order under challenge may be running in number of pages, even then it may be found by the higher forum as an order without proper application of mind. The present order is one of such order.

14. When the appellants have made clear averments in the plaint para-6 that they have commenced activities for developing the land and the permission for development is obtained from the District Panchayat, permission for N.A. Use is also obtained and that green signal from AUDA to put up construction, the ld. Judge could not have held

that the appellants have not indicated that they wanted to develope the land. The entire history of original survey no.276 was available on record and in that application exh.30 and the star document exh.32/6 could not have been ignored easily. Today also, this Court is to simultaneously pronounced the order rejecting Civil Application No. 4325/2003 praying for condonation of delay in preferring A.O. ST.No.246/2003 challenging the order passed below exh.5 granting interim relief in favour of the appellants plaintiffs. So rejection of the said civil application obviously confers a better right on the appellants plaintiffs to possess, occupy and develope the suit property without any interruption. However, it would be obligatory on the part of the plaintiffs appellants that development or construction activities including allotment, sale or transfer of such developed property would be subject to the final out of the suit.

15. This Court, while dealing with the case of Shrirang Developers & Others v/s Himmatlal Jamnalal Maniar, reported in 2003(2) GLH 680 has observed that the appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, capriciously or perversely or where the Court had ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. In the cited case, ld. Civil Judges had passed different orders. In one set of matters, the ld. Civil Judge had granted injunction and in other set of matters, the other ld. Civil Judge had not granted the injunction. In the present case, the very Court in the same suit viz. Civil Suit No. 81/2001 has passed the overlapping orders, if not contradictory in stricto senso. Now the balance is required to be struck at this interlocutory stage. The discretion exercised while dealing with application exh.30 in the lower Court, the ld. Judge has not either acted reasonably or in judicious manner. It is apparent that the Lower Court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions.

16. Ld. Sr.Counsel Mr. M.C.Bhatt appearing for the appellants plaintiffs has fairly accepted that plaintiffs shall inform and enlighten the prospective buyers, allottees or transferees about pendency of both litigations i.e. Civil Suit No.81/2001 and Civil Suit No.165/2000. This submission and statement made by ld. Sr.Counsel Mr. Bhatt is sufficient to meet with alleged

right or resistance put forward by respondent nos. 2 to 9.

17. For the reasons aforesaid, this Appeal from Order is hereby allowed and the order under challenge passed below application exh.30 on 24.7.2003 by ld. Civil Judge (S.D.), Ahmedabad (Rural) in Spl.Civil Suit No. 81/2001 is hereby quashed and set aside and the order passed below application exh.30 shall not be construed and treated as the order clarifying the earlier order passed below application exh.5 or as supplementary order to the order passed below application exh.5. No costs.

18. In view of the order passed in the main A.O., Civil Application Nos. 5388/2003 & 6191/2003 have been rendered infructuous and hence the same also stand disposed of as having become infructuous. Notice issued in CA No.5388/2003 is discharged. Interim relief granted earlier stands vacated. No costs. Further, notice issued in C.A.No.6191/2003 also stands discharged. No costs. Both the suits are ordered to be expedited.

[C.K. BUCH, J]
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